

October 3, 2001

Mr. Roger Hinkle

USDA, Stop 0553

1400 Independence Av., SW.

Washington, D. C. 20250-0553

RE: Proposed USWA Regulations

Dear Ms. Hinkle:

On September 4, 2001, the USDA published proposed USWA regulations and requested comments on these regulations. We have now had an opportunity to review the regulations and would like to offer you our comments on them.

As you know, Staplcotn is one of the largest cotton warehouse operators in the United States. We have very closely monitored the USDA's progress towards the implementation of these rules and have maintained a very guarded position as to the proposed changes. We have successfully worked with the USDA to delete several undesirable sections of the new Warehouse Act before its enactment by Congress.

In reviewing the proposed regulations to be implemented in conjunction with the new act, we find objectionable issues that were deleted from the Warehouse Act now resurrected in the form of proposed regulations.

MANDATORY ARBITRATION

One of the chief objections that Staplcotn raised in the revised Warehouse Act related to the inclusion in the Act of any type of mandatory arbitration. While the concept of arbitration itself is not an objectionable subject, we feel that a party's desire to arbitrate or litigate a subject is a matter that should be left to the contracting parties. Binding arbitration should not

be forced upon the contracting parties by a mandate from the USDA. Because of the efforts of numerous interested parties like Staplcotn, approximately ten pages of mandatory arbitration provisions were deleted from the original draft of the U.S. Warehouse Act. In its final form, the U. S. Warehouse Act left arbitration as a matter of choice between the contracting parties. The proposed regulations and licensing agreements as published have made arbitration mandatory again.

Under Section 735.9 (page 10) of the proposed rules, any dispute between warehouse operators and their customers or shippers may be resolved by arbitration between the parties. The terms of this regulation are consistent with the provisions that were adopted in the new Warehouse Act. Since these provisions allow for freedom between the parties to contract between themselves as to arbitration, we have no objection to the wording of these regulations. However, the proposed regulations did not stop here but make arbitration mandatory in the proposed licensing agreement.

Under paragraph 8 of the Cotton Licensing Agreement, the USDA has included a provision for mandatory arbitration between the parties. According to this paragraph, federally licensed cotton warehouse operators would agree to the following:

8. To resolve any claim for noncompliance with the cotton shipping standard through established industry, professional, or mutually agreed upon arbitration procedures. The arbitration procedures will be nondiscriminatory and provide each person equal access and protection relating to the cotton shipping standard.

We object to this language and will continue to object to the inclusion of this language in any regulation or licensing agreement. As mentioned, arbitration is the proper subject for the contracting parties to any agreement. Whether to arbitrate or not is a matter that should be left to the mutual agreement of the parties involved in dispute.

The U.S. Warehouse Act as amended by Congress in no way mandates that arbitration be used as the means for resolving disputes between parties. The provisions of the U. S. Warehouse Act leave arbitration as a voluntary means of resolving disputes. Inasmuch as Congress did not mandate arbitration, the USDA is without authority to implement any type of regulation or licensing agreement that would require that the parties arbitrate in every instance.

Staplcotn strongly objects to the inclusion of mandatory arbitration as a part of any regulation or licensing agreement to be implemented by the USDA in conjunction with federally licensed warehouses.

REGULATION VS. LICENSING AGREEMENT

The USDA states in their proposed regulations that the new regulations have been modified so as to make the regulations themselves applicable to all commodities and not just to cotton. For the most part, the new regulations are a word-for-word rewrite of the regulations

that presently exist for cotton. Only the number and location of many of the regulations has been changed.

Under the new regulations each federally licensed warehouse operator will be required to sign a licensing agreement. While this document is termed an agreement, it is very doubtful that the agreement will have terms that can be negotiated between the parties or that the warehouse operator will have any meaningful input into the wording of the agreement. Thus, what the USDA has labeled as a licensing agreement will serve as nothing more than additional regulations for warehouse operator.

Staplcotn would contend that the terms of the licensing agreement represent regulations that have general applicability and legal effect that would necessitate that they be published as regulations in the Federal Register before being incorporated into any licensing agreement. The publication of these regulations in the Federal Register would allow for the general public to comment on any aspect of the regulations prior to their implementation. The need for the inclusion of the terms of the licensing agreement as regulations that should be published in the Federal Register first becomes most obvious in the mandate arbitration provisions of the agreement pointed out above.

It is our concern that future changes in the licensing agreement will not be published in the Federal Register despite the fact that the terms in the licensing agreement are regulatory in nature. A warehouse operator would have to subject himself to the changes in order to maintain his license but would have no say in the change in the agreement. Since these types of terms of the licensing agreement serve to regulate, they must be published in the Federal Register.

NEW YORK LAW APPLICATION

Under the proposed regulations, the USDA has indicated that the laws of the State of New York will govern all transactions entered into with the use of the new provider system. This section states:

All disputes arising under any transaction conducted through the use of a provider approved under Sec. 735.402 shall be determined by the application of the laws of New York State except that the laws of New York relating to the legal doctrines of the choice of law and determination of venue shall not be applicable.

The only aspects that would be left to the courts are the choice of law and venue issues for the cause. Staplcotn finds these provisions to be objectionable in that the USDA is in no position to determine that the laws of one sovereign state are better than those of another. We are convinced that any litigation that follows after the implementation of these rules should be resolved in accordance with the laws of the sovereign in which the cause of action arose.

Under the proposed New York Rule, it is not hard to imagine a situation where a Texas Red River Valley cotton grower produces his cotton in Texas but stores the cotton in

Texarkana, Arkansas. This same producer then sells his cotton to a mill in North Carolina. A dispute later arises with regard to the warehouse and the parties find themselves in Arkansas Federal Court in a case involving parties from Texas, Arkansas, and North Carolina who are forced to resolve their dispute by applying New York law. This does not seem to make good walking around sense, and appears to be a further attempt by the USDA to choose the forum in which the parties are to resolve all their disputes. Again, this is wholly outside the scope of the powers of the USDA.

FINANCIAL STATEMENTS

Under Section II (b) (1) of the Cotton Licensing Agreement, all warehouse operators must submit financial statements to the USDA annually within 90 days of the close of their fiscal year. Staplcotn would like to see this part of the agreement revised to increase the deadline to 120 days. The reason for this request is simply the practicality of being able to provide a financial statement within 90 days. At the close of its fiscal year, Staplcotn delivers to the account firm of Deloitte & Touche its financial documentation. Presently, Deloitte & Touche takes in excess of 90 days to review these documents before issuing their final financial statement. Thus, Staplcotn would not be able to comply with the 90 days requirement of the present proposed regulation but could comply with the regulation if the term were increased to 120 days.

We certainly understand that the regulation provides for an extension of an additional 30 days. Staplcotn would like to forego having to request an extension of 30 days from the original 90-day period. If the regulation were increased to provide for 120 days initially, many warehouse operators, such as Staplcotn, would be able to comply with this timeline without the necessity of making additional applications for extensions.

SUMMARY

Staplcotn is very much interested in the regulations that are to be implemented by the USDA in conjunction with the new Warehouse Act. For the most part, the regulations that are being proposed by the USDA are simply rewrites of regulations that were applicable to cotton warehousing facilities anyway. However, the few changes that have been noted above are changes that were not previously included in the regulations covering cotton warehouses. These few proposed changes cause us serious concern inasmuch as they take away from our ability to decide whether or not we want to litigate or to arbitrate. They also take away our ability to choose the forum in which we would like to resolve our disputes. Neither of these is an area that should be allowed to be regulated by the USDA.

We are very much interested in any further amendments or changes that may be made to these proposed regulations and ask that you notify us as soon as any such changes are proposed. If you have any questions, please feel free to contact me.

Sincerely,

Kenneth E. Downs
General Counsel

KED/eba